

SERVED: August 23, 1993

NTSB Order No. EA-3962

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 9th day of August, 1993

_____)	
JOSEPH M. DEL BALZO,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-11751
v.)	
)	
MARK PARADOWSKI,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Jimmy N. Coffman, issued on October 22, 1991, at the conclusion of an evidentiary hearing.¹ By that decision, the law judge affirmed an order of the Administrator suspending respondent's private pilot certificate for 120 days on allegations of violations of sections 91.119(a), 91.119(c), and

¹The initial decision, an excerpt from the hearing transcript, is attached.

91.13(a) of the Federal Aviation Regulations (FAR), 14 C.F.R. Part 91.² The facts which serve as the basis of the complaint are that respondent is alleged to have made two low passes over a nude beach in Sandy Hook, New Jersey, on July 1, 1990, over the Fourth of July weekend.

The Administrator's case consisted of the eyewitness testimony of two of the sun-bathers who were on the beach that day. One of them is a licensed pilot. According to his testimony and the testimony of his wife (then his fiancée), respondent came up from the south, flew along the shoreline, turned, and made a second pass behind them and over some sun-bathers who were playing soccer. The aircraft then climbed in altitude and departed to the south. According to these

²FAR §§ 91.119(a), 91.119(c), and 91.13(a) [formerly §§ 91.79(a), 91.79(c), and 91.9] provide as follows:

"§ 91.119 Minimum safe altitudes. General.

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes.

(a) Anywhere. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface....

(c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

§ 91.13 Careless or reckless operation.

(a) Aircraft operations for the purpose of air navigation. No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

witnesses, both passes were at an altitude of 50 feet.³ There were at least a few hundred people on the beach at the time of the incident.

A Federal Ranger on duty at Sandy Hook, which is a part of the Gateway National Recreation Area, testified that he was about 4 miles south of the nude beach when he saw the aircraft, flying in a northerly direction, at the water's edge. All three witnesses identified the aircraft as a high-wing Cessna 152 or 172, with a brownish stripe. According to the ranger, when he observed the aircraft it appeared to be at an altitude of 100 feet. Respondent admitted to piloting the aircraft, but claims that he flew over the beach only once, at an altitude of 500 feet, and that the only reason he descended to 100 feet was to avoid a collision with a banner-towing aircraft which was headed towards him at 12 o'clock. All three of the Administrator's witnesses testified that there were no other aircraft in the area at the time of respondent's low flight. The law judge, in affirming the Administrator's order in its entirety, made a clear credibility finding in favor of the Administrator's witnesses. He concluded that "...the case can be reduced to five words. Respondent caught buzzing nude beach." (Initial decision at 69).

Respondent raises several issues on appeal.⁴ He argues

³Respondent's aircraft was low enough so that they could copy down the aircraft registration number. In fact, the wife of the private pilot was able to identify respondent, sitting at counsel's table, as the pilot of the aircraft which overflew them.

⁴The Administrator has filed a brief in reply, urging the

that the law judge failed to give weight to his expert witness' testimony concerning the potential for hazard⁵ if there was engine failure at an altitude of 100 feet over a beach with a few sun-bathers, and he asserts that the law judge should have found that, in any event, an emergency existed which excused respondent's low flight.⁶ Respondent fails to recognize, however, that all of his arguments are contingent on the acceptance of his version of the facts, and the law judge found his testimony unworthy of belief. A law judge's credibility choices are not vulnerable to reversal on appeal simply because a respondent puts forth an alternative explanation. Administrator v. Klock, NTSB Order No. EA-3045 at 4 (1989). It is axiomatic that the "process of choosing between conflicting testimony" is subjective, Administrator v. Walker, 3 NTSB 1298, 1299 (1978), and unless made in an arbitrary or capricious manner, the resolution of credibility issues is within the exclusive province of the law judge. Administrator v. Smith, 5 NTSB 1560, 1563 (1987). Respondent offers us no persuasive reason to reverse the law judge's credibility determination here. We adopt the law

(..continued)
Board to affirm the initial decision.

⁵Contrary to respondent's assertion, the finding of a violation of FAR § 91.119 is sufficient to support the residual finding of a violation of FAR § 91.13(a).

⁶Respondent asserts, alternatively, that the sanction is excessive. Our review of the precedent cited by the Administrator in his reply brief suggests that the sanction, while high, is not inconsistent with precedent. See e.g., Administrator v. Owens, 4 NTSB 907 (1983)(180-day suspension for operating an aircraft 35 feet above hilly, wooded terrain, and in proximity to vehicles on the ground).

judge's findings as our own.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's order and the initial decision are affirmed; and
3. The 120-day suspension of respondent's airman certificate shall begin 30 days from the date of service of this order.⁷

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁷For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR §61.19(f).